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Nos. 728, 729, and 730

In the Supreme Court of the United States

OCTOBER TERM, 1932

THOMAS S. WILLIAMS

v.

THE UNITED STATES

DANIEL W. O'DONOGHUE

v.

THE UNITED STATES

WILLIAM HITZ

v.

THE UNITED STATES

ON CERTIFICATES FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The Court of Claims has rendered no opinion.

JURISDICTION

The certificates of the Court of Claims were filed February 24, 1933. The jurisdiction of this Court

rests on Section 3(a) of the Act of February 13, 1925.

QUESTIONS PRESENTED

The questions certified in the three cases may be combined as follows:

1. Does Section 1, Article III, of the Constitution of the United States apply to the Court of Claims and to the Supreme Court and Court of Appeals of the District of Columbia and forbid a reduction of the compensation of the Judges thereof during their continuance in office?

2. Does the provision of Section 2, Article III, of the Constitution, wherein it is stated that "The judicial Power shall extend * * * to Controversies to which the United States shall be a party", apply to the Court of Claims, and does this provision authorize the creation and establishment of that Court?

3. Can the compensation of a Judge of the Court of Claims or of the Supreme Court or Court of Appeals of the District of Columbia be lawfully diminished during his continuance in office?

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Constitution involved in these cases are set forth in the Appendix (*infra*, pp. 12–13).

STATEMENT

The facts stated in the certificates may be summarized as follows (No. 728, R. 1–4; No. 729, R. 1–3; No. 730, R. 1–3):

The plaintiffs are a Judge of the Court of Claims, a Justice of the Supreme Court of the District of Columbia, and a Justice of the Court of Appeals of the District of Columbia, respectively. By the Act of June 30, 1932, c. 314, 47 Stat. 382, 399–403, the salaries of certain officers and employes of the United States were reduced. By a ruling of the Comptroller General this statute was held applicable to the Judges of the Court of Claims, and to the Justices of the Supreme Court and the Court of Appeals of the District of Columbia. Pursuant to this ruling, the plaintiffs have since July 1, 1932, been paid at the reduced rate provided in the statute.

The plaintiffs brought separate suits in the Court of Claims for the difference between the amount which they received at the time the respective suits were brought and the amount each would have received during that period had his compensation not been reduced. The defendant demurred to each petition and the Court of Claims thereupon certified to this Court the questions which have been stated above.

SUMMARY OF ARGUMENT

The plaintiffs contend that they are Judges of constitutional courts created by Congress under the provisions of Section 1 of Article III of the Constitution and that accordingly their salaries may not be diminished during their continuance in office. Obviously the constitutional provisions in

question must be construed in the light of their history and of the development of our institutions and not without reference to the distinction which has so clearly been drawn between constitutional and legislative courts.

This Court's decision in *Ex parte Bakelite Corporation,* 279 U.S. 438, is a direct and conclusive authority against the contention of the plaintiffs. In that case both the Court of Claims and the courts of the District of Columbia were considered and expressly held to be legislative courts. Even if that decision is to be regarded as decisive only with respect to the Court of Customs Appeals with which it was primarily concerned, the reasoning of the opinion leaves no room for the contention made by the plaintiffs here.

It is, of course, well recognized that a constitutional court may not be empowered to determine legislative or administrative questions. Congress has repeatedly conferred such powers upon the Court of Claims, and their exercise by that court has not been questioned. Similar powers have been vested in and exercised without question by the courts of the District of Columbia.

ARGUMENT

The contention of the Judges who instituted these suits before the Court of Claims is that they are Judges of constitutional courts created by Congress under the provisions of Section 1 of Article III of the Constitution of the United States, and

that accordingly their salaries may not be diminished during their continuance in office.

Section 1 of Article III of the Constitution provides:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Obviously these provisions of the Constitution are not to be construed without reference to the history and development of our institutions, and to the distinction which in the application of these provisions has been so clearly drawn between constitutional and legislative courts.

In *Ex parte Bakelite Corporation,* 279 U.S. 438, this Court had occasion to interpret Section 1 of Article III of the Constitution in the light of its history and its application to courts of the United States. The constitutional status of the Court of Claims, and of the courts established by Congress for the District of Columbia, was exhaustively examined, and it was concluded that all of these courts were legislative courts, not constituted under Section 1 of Article III of the Constitution, and therefore not subject to the limitations of that section.

True, the ultimate decision in the *Bakelite case* was that the Court of Customs Appeals is a legislative court. But in reaching that conclusion this Court found it necessary in its interpretation of Section 1 of Article III to trace the history of its application in the development of our judicial institutions and of the distinction repeatedly recognized in the decisions of this Court between constitutional courts and legislative courts.

It was necessary to that decision to analyze the previous decisions of this Court in order to determine the characteristics of a legislative court. As the result of careful and exhaustive analysis, legislative courts were defined as: (1) courts created by Congress by virtue of its power "to exercise exclusive legislation over the District made the seat of the Government of the United States"; (2) courts created by virtue of the power of Congress to make all needful rules and regulations respecting the territory belonging to the United States; and (3) courts created as special tribunals to examine and determine various matters arising between the Government and others, which from their nature do not require judicial determination and yet are susceptible of it.

It was necessary, in formulating this test and analysis of the constitutional power of Congress to establish legislative courts, to consider the courts which Congress has thus established, and the decisions of this Court characterizing them as legisla-

tive courts, including the Court of Claims and the courts provided by Congress for the District of Columbia. The decision of the Court was rested upon this analysis, and it was held that the courts provided by Congress for the District of Columbia, created by virtue of the power of Congress to legislate for the District, were legislative courts, and that the Court of Claims, created and maintained as a special tribunal to examine and determine claims for money against the United States, was also a legislative court.

If we are right in regarding the conclusion of this Court in the *Bakelite case* with respect to the constitutional status of the Court of Claims and of the courts established by Congress in the District of Columbia as necessary to the decision of that case, then we see no escape from the conclusion that that decision is controlling here upon the principle of *stare decisis.*

The principles declared in the *Bakelite* decision were reiterated and applied by this Court in *Crowell* v. *Benson*, 285 U.S. 22, 50:

> Thus the Congress, in exercising the powers confided to it, may establish "legislative" courts (as distinguished from "constitutional courts in which the judicial power conferred by the Constitution can be deposited") which are to form part of the government of territories or of the District of Columbia, or to serve as special tribunals "to examine and determine various matters, arising between the government and others,

> which from their nature do not require judicial determination and yet are susceptible of it". But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals". *Ex parte Bakelite Corp.*, 279 U.S. 438, 451.

Both the majority and minority opinions in the *Crowell case* accept the *Bakelite case, supra*, as authoritative in its analysis of the distinctions between legislative and constitutional courts. See 285 U.S. at 57–58, 86–91.

In *Miles* v. *Graham*, 268 U.S. 501, this Court's attention was not drawn to the question whether the Court of Claims is a statutory court or a constitutional court. That question was neither presented in the briefs or argument nor considered in the opinion, and accordingly this Court declared in *Ex parte Bakelite Corp., supra*, that the decision in *Miles* v. *Graham* could not be taken as disturbing the earlier rulings of this Court or attributing to the Court of Claims any status other than that of a legislative court. *Ex parte Bakelite Corp.*, 279 U.S. 438, 455.

Accordingly, we believe that conclusion must follow from the decision and the careful analysis of prior decisions of this Court in *Ex Parte Bakelite Corp.*, and from the reaffirmation of the principles upon which those decisions rest in *Crowell* v. *Benson*, that the Court of Claims is a legislative

court created by Congress as a special tribunal to examine and determine claims against the United States, and that the Supreme Court and the Court of Appeals of the District of Columbia, created by virtue of the power of Congress "to exercise exclusive legislation over the District", are also legislative courts. This conclusion is buttressed by the fact that Congress and this Court have so regarded and treated them.

It is, of course, well recognized that a constitutional court may not be empowered to determine legislative or administrative questions.[1] Congress has repeatedly conferred such powers upon the Court of Claims, and their exercise by that court has not been questioned.[2] Similar powers have been vested in and exercised without question by the Supreme Court and the Court of Appeals of the District of Columbia,[3] and the tenure of judicial

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[1] *Hayburn's Case*, 2 Dallas 409; *United States* v. *Ferreira*, 13 Howard 40; *Gordon* v. *United States*, 2 Wallace 561, 117 U.S. 697; *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464.

[2] See Sections 12 and 14 of the Act of March 3, 1887, c. 359, 24 Stat. 505, 507; Act of June 25, 1910, c. 409, 36 Stat. 837; Judicial Code, Sec. 151; *In re Sanborn*, 148 U.S. 222; *Widmayer* v. *United States*, 42 C.Cls. 519; *Montgomery* v. *United States*, 49 C.Cls. 574.

[3] *Keller* v. *Potomac Electric Power Co.*, 261 U.S. 428; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U.S. 693; *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464. The advisory power of the District of Columbia courts in patent cases began as early as the Act of March 3, 1839, c. 88, secs. 11, 13, 5 Stat. 353, 354–355.

office in the inferior courts of the District has been limited by Congress to stated terms.[4]

This Court has thus repeatedly recognized that the power of Congress, in legislating for the courts of the District of Columbia and for the Court of Claims is free of the limitations imposed by Article III of the Constitution. This does not mean that the tribunals in question are not courts, or that they do not exercise judicial power. The exercise of judicial power is common to both legislative and constitutional courts and determines the status of neither. As this Court said in *Ex parte Bakelite Corporation,* 279 U.S. 438, 449:

> it long has been settled that Article III does not express the full authority of Congress to create courts, and that other Articles invest Congress with powers in the exertion of which it may create inferior courts * * *.

CONCLUSION

Conclusion follows that Section 1 of Article III of the Constitution does not apply to the Court of Claims nor to the courts of the District of Columbia so as to forbid a reduction of the compensation of the Judges thereof during their continuance in office, that the provision of Section 2 of Article III of the Constitution does not apply to the Court of Claims, and that the compensation of Judges of the

[4] Act of February 27, 1801, c. 15, secs. 3, 11, 12, 2 Stat. 103, 105, 107; D.C. Code, secs. 3, 42, 60, 221; Act of February 17, 1909, c. 134, 35 Stat. 623.

Court of Claims and of the courts of the District of Columbia may be lawfully diminished during their continuance in office.

In No. 728 the first two questions certified should be answered in the negative and the third in the affirmative. In Nos. 729 and 730 the first question certified should be answered in the negative and the second in the affirmative.

Respectfully submitted.

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APPENDIX

Article I, Section 8, of the Constitution provides in part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *.
>
> * * * * *
>
> To constitute Tribunals inferior to the supreme Court;
>
> * * * * *
>
> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the government of the United States * * *.
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article III of the Constitution provides in part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold

their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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